Martin K. Banks (#5443)
STOEL RIVES
201 South Main, Suite 1100
Salt Lake City, UT 84111
Telephone: (801) 578-6975
Fax: (801) 578-6999

Michael G. Jenkins (#4350)
Assistant General Counsel
PacifiCorp
201 South Main, Suite 2200
Salt Lake City, UT 84111
Telephone: (801) 220-2233
Fax: (801) 220-3299

Attorneys for PacifiCorp

BEFORE THE UTAH AIR QUALITY BOARD

In Re: Approval Order – the Sevier Power Company, 270 MW Coal-Fired Power Plant, Sevier County Project Code: N2529-001 DAQE-AN2529001-04	**PACIFICORP'S MOTION FOR JUDGMENT ON THE PLEADINGS**

Pursuant to Rule 12(c) of the Utah Rules of Civil Procedure, PacifiCorp hereby submits this Motion for Judgment on the Pleadings regarding the Sierra Club's Request for Agency Action. This Motion pertains to the following two issues set forth in Sierra Club's Request for Agency Action:

1. The Executive Secretary failed to address carbon dioxide and other greenhouse gas emissions in issuing the Sevier Power Company PSD permit.
2. The Executive Secretary failed to consider adequately Integrated Gasification Combined Cycle in its BACT determination for Sevier Power Company facility.

This Motion is supported by a Memorandum in Support filed herewith and incorporated by reference herein, and all other pleadings on file with the Utah Air Quality Boar in this matter.

Dated this 26th day of February, 2007.

ATTORNEYS FOR PACIFICORP

STOEL RIVES LLP

Marty Banks

Martin K. Banks

Michael Jenkins by MB

Michael G. Jenkins,
Assistant General Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of February, 2007, I emailed and mailed a true and correct copy of the foregoing **PACIFICORP'S MOTION FOR JUDGMENT ON THE PLEADINGS** to the following:

Fred Nelson
Attorney General's Office
160 East 300 South, 5th Floor
Salt Lake City, Utah 84114
fnelson@utah.gov

Fred Finlinson
Finlinson & Finlinson
11955 Lehi-Fairfield Road
Lehi, Utah 84043
f2fwcrf@msn.com

Joro Walker
Dave Becker
1473 South 1100 East, Suite F
Salt Lake City, Utah 84105
jwalker@westernresources.org
dbecker@westernresources.org

Chris C. Stephens
Assistant Attorney General
Environment Division
Utah Attorney General's Office
150 North 1950 West
PO Box 144820
Salt Lake City, Utah 84114-4820
cstephens@utah.gov

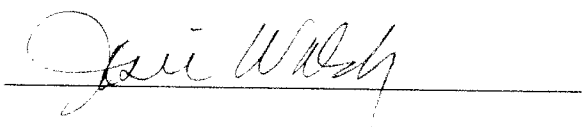
Blaine Rawson
Holme Roberts & Owen
299 S. Main Street, Suite 1800
Salt Lake City, Utah 84111
blaine.rawson@hro.com

Paul M. McConkie
Assistant Attorney General
160 East 300 South
Salt Lake City, Utah 84114
pmcconkie@utah.gov

Brian Burnett
Callister Nebeker
Gateway Tower East, Suite 900
10 East South Temple
Salt Lake City, Utah 84133
brianburnett@cnmlaw.com

H. Michael Keller
Matthew F. McNulty, III
VanCott, Bagley, Cornwall & McCarthy
50 South Main Street, Suite 1600
Salt Lake City, Utah 84114
mkeller@vancott.com
mmcnulty@vancott.com

Michael Jenkins
Asst. General Counsel
PacifiCorp
201 South Main, #2200
Salt Lake City, Utah 84111
Michael.jenkins@pacificorp.com



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Telephone: (801) 578-6975
Fax: (801) 578-6999

Michael G. Jenkins (#4350)
Assistant General Counsel
PacifiCorp
201 South Main, Suite 2200
Salt Lake City, UT 84111
Telephone: (801) 220-2233
Fax: (801) 220-3299

Attorneys for PacifiCorp

BEFORE THE UTAH AIR QUALITY BOARD

In Re: Approval Order – the Sevier Power Company, 270 MW Coal-Fired Power Plant, Sevier County Project Code: N2529-001 DAQE-AN2529001-04	**PACIFICORP'S MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS**

PacifiCorp requests the Utah Air Quality Board (the "Board") to dismiss, as a matter of law, two of the issues raised in the Request for Agency Action filed by the Sierra Club on November 12, 2006 ("Request for Agency Action"): (i) whether Integrated Gasification Combined Cycle ("IGCC") technology must be considered during the Best Available Control Technology ("BACT") analysis; and (ii) whether "carbon dioxide and other greenhouse gas emissions" ("GHG") must be considered or regulated as part of the air permit process.[1]

[1] The Request for Agency Action was submitted jointly by the Sierra Club and by the Grand Canyon Trust., but on January 25, 2007, the Grand Canyon Trust filed its Notice of Withdrawal from this proceeding. PacifiCorp's Petition to Intervene was granted by the Utah Air Quality Board at its February 7, 2007 hearing.

I. INTRODUCTION

The parties and the Board have consented to PacifiCorp participating in this matter in regard to the two issues noted above. This status provides for the filing of dispositive motions, and in that light PacifiCorp submits this Memorandum in Support of its Motion for Judgment on the Pleadings.

II. STANDARD OF REVIEW

Rule 12(c) of the Utah Rules of Civil Procedure allow a party to file a Motion for Judgment on the Pleadings, which is a mechanism the Board may use to dispose of issues that are legal rather than factual in nature. 5C Wright & Miller, Federal Practice and Procedure § 1367 (2005). For example, legal issues would include whether the law requires the regulation of GHG or the inclusion of IGCC in a BACT analysis, whereas factual issues would include whether GHG is harmful to the environment or whether IGCC is economically feasible. To narrow the issues that will ultimately have to be addressed at the hearing in this matter, the Board can use a judgment on the pleadings at this early dispositive motion stage to resolve and eliminate those issues or claims "when the moving party is entitled to judgment on the face of pleadings themselves." *Mountain America Credit Union v. McClellan*, 854 P.2d 590, 591 (Utah Ct. App. 1993). Accordingly, as to Sierra Club's claims that are legal in nature, such as Claim #1 and #2, the Board need only apply the law and issue a decision, thus eliminating the time and expense of addressing that issue at the final hearing.

III. BURDEN OF PROOF

It is the petitioner, Sierra Club, that carries the burden of proof in this administrative adjudication, and the "proper standard of proof in the administrative context is generally the 'preponderance of the evidence' standard." *Harkin Southwest Corp. v. Board of Oil, Gas and Mining*, 920 P.2d 1176, 1182 (Utah 1996). In addition, the petitioner, Sierra Club, must

overcome the presumption of correctness which accompanies the actions of an administrative agency, which means that the Executive Secretary's "actions [in issuing an air permit to the Sevier Power Company are] endowed with a presumption of correctness and validity." *Cottonwood Heights Citizens Ass'n. v. Board of Comm'rs. of Salt Lake County*, 593 P.2d 138, 140 (Utah 1979).

IV. BACKGROUND

A. **Greenhouse Gas Emissions (Claim #1)**: PacifiCorp's legal argument is very simple -- neither the federal Clean Air Act nor the Utah Air Conservation Act or its implementing regulations authorize or require the State of Utah to regulate GHG in connection with an air permit or otherwise. Under the Utah Air Conservation Act, the Board may make rules "regarding the control, abatement, and prevention of air pollution," and the Executive Secretary may, as authorized by the Board, enforce such rules as the Board may make. Utah Code Ann. §§ 19-2-104(1)(a) & 107(2)(g). However, in its discretion, the Board has never made any such rules for the regulation of GHG. Accordingly, the Executive Secretary was not authorized or required to address GHG in connection with its issuance of the AO. It is this legal issue -- whether any existing statute or regulation required the Executive Secretary to address GHG -- that is the subject of Sierra Club's Claim #1.

B. **Integrated Gasification Combined Cycle (Claim #2)**: Under the Clean Air Act's New Source Review provisions and similar provisions of the Utah Air Conservation Act, a party intending to construct a "major" new source in a NAAQS attainment area must first obtain a PSD permit. 42 U.S.C. § 7475(a). Under the PSD requirements the applicant must demonstrate, among other things, that the new source will employ BACT for each criteria pollutant emitted. 42 U.S.C. § 7475(a)(4); Utah Admin. Code R307-401-6(1).

Under the applicable Utah regulations, BACT is defined as follows:

> [A]n emission limitation and/or other controls to include design, equipment, work practice, operation standard or combination thereof, based on the maximum degree or reduction of each pollutant subject to regulation under the Clean Air Act and/or the Utah Air conservation Act emitted from or which results from any emitting installation, which the Air Quality Board, on a case-by-case basis taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such installation through application of *production processes and available methods, systems, and techniques*, including fuel cleaning or treatment or innovative fuel combustion techniques for control of each such pollutant...."

Utah Admin. Code. R307-101-2(4)(emphasis added)[2]

A "top-down" method for determining BACT is recommended by EPA, and required by Utah. *See* EPA Memorandum re Improving NSR Implementation; 61 Fed. Reg. at 38, 272-73; Utah NOI Guide, Form 1b. This top-down method includes 5 steps: (1) identify all available control technologies (the "First Step"), (2) eliminate technically infeasible control technologies, (3) rank remaining technologies by effectiveness, (4) evaluate the most effective controls (assessing the energy, environmental and economic impacts), and (5) select the most effect remaining option. EPA's New Source Review Workshop Manual ("NSR Manual"), at B.5. In the course of the BACT analysis, one or more of the options may be eliminated if they are demonstrated to be technically infeasible or have unacceptable energy, environmental or economic impacts on a case-by-case basis. However, the First Step is to identify all available control technology options.[3] It is this legal issue -- whether the Executive Secretary was required to include IGCC in this First Step -- that is the subject of Sierra Club's Claim #2.

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[2] Utah's BACT definition is substantially similar to the federal definition. *See* 42 U.S.C. § 7479(3).

[3] Although not material or necessary to the resolution of this legal issue of whether the Executive Secretary was required to include IGCC in this First Step, the "available" options that must be identified are only "those control technologies or techniques with a practical potential for application to the emission unit." NSR Manual, at B.5. The NSR Manual further provides that applicants are only expected to identify "demonstrated and potentially applicable control technology alternatives." NSR Manual at B.11. "Technologies that have not been applied to (or permitted for) full scale operations need not be considered available; an applicant should be able to purchase or construct a process or control device that has already been demonstrated in practice." NSR Manual, at B.11; *see also Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981) (*quoting Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978) ("If the technology is not available, the permit applicant is under no duty to consider it in the BACT

V. ARGUMENT

A. Greenhouse Gas Emissions (Claim #1)

In its Request for Agency Action, Sierra Club asserts that "[p]ursuant to the [federal] Clean Air Act and Utah Air [Conservation] Act and its implementing rules, the State of Utah has the legal obligation to regulate greenhouse gases," and that under the definition of BACT, "Utah is required to consider . . . greenhouse gas emissions, when determining BACT for a facility."

1. Neither the Clean Air Act, nor the Utah Air Conservation Act or its Implementing Regulations, Authorize or Require Utah to Regulate GHG

Under the federal Clean Air Act, EPA is charged with the task of identifying certain air pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare," and then establishing national ambient air quality standards ("NAAQS") to protect against adverse effects from each identified pollutant. 42 U.S.C. § 7408(a)(1). Significantly, EPA has not identified carbon dioxide or other GHG as a regulated air pollutant, and has not established any NAAQS for GHG. The Clean Air Act does not obligate Utah or any other state to regulate GHG. Sierra Club cannot cite to any particular provision of the Clean Air Act obligating the regulation of GHG. *In re: Kawaihae Cogeneration* Project, 1997 WL 221391, 7 E.A.D. 107 (E.P.A. April 28, 1997)("[A]t this time there are no regulations or standards prohibiting, limiting or controlling the emissions of greenhouse gases from stationary sources. Carbon dioxide is not considered a regulated air pollutant for permitting purposes."). Even more significantly, although Sierra Club has been urging courts around the

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analysis.")); *In re Spokane Regional Waste-to-Energy Applicant, PSD App. No. 88-12,* 1989 WL 266360 (EPA June 9, 1989)("A technology is obviously not available in any meaningful sense if knowledge about its effect on emissions, in the particular configuration in which it would be employed, is so incomplete as to be unusable"). Because Sierra Club cannot not offer any evidence that IGCC technology is available as a control technology option, IGCC cannot be deemed an "available" control technology.

country to infer such an obligation into the Clean Air Act, Sierra Club has not cited to any judicial decision that does so. Moreover, EPA, the federal agency that administers the Clean Air Act, has never used that Act or any other authority to try to regulate GHG.

Similarly, neither the Utah Air Conservation Act nor its implementing regulations obligate Utah to regulate GHG. Again, Sierra Club has not cited to any particular provision of the Utah Air Conservation Act or its implementing regulations obligating the regulation of GHG, and has not cited to any judicial decision wherein a court has inferred such an obligation. Moreover, the Utah Division of Air Quality ("UDAQ"), the state agency that administers the Utah Air Conservation Act and its implementing regulations, has never used that Act or those regulations, or any other authority, to try to regulate GHG.

Under the Utah Air Conservation Act, the Board may make rules "regarding the control, abatement, and prevention of air pollution," and the Executive Secretary may, "as authorized by the Board," enforce such rules as the Board may make. Utah Code Ann. §§ 19-2-104(1)(a) & 107(2)(g). However, in its discretion, the Board has never made any such rules for the regulation of GHG, and has never authorized the Executive Secretary to enforce the regulation of GHG. Accordingly, the Executive Secretary has never been authorized, let alone required, to address GHG in connection with the issuance of an AO.

Although nothing in the applicable federal or state statutory or regulatory schemes obligates Utah to regulate GHG, the Utah legislature could enact legislation and/or the Board could make administrative rules to regulate GHG if either so chooses. In fact, Utah is currently in the process of formulating an action plan for ascertaining if and how it will address GHG. UDAQ, in conjunction with the Department of Natural Resources, Office of Energy, has undertaken an emissions inventory of the important sources of greenhouse gases. UDAQ has

completed the basic inventory, and the Office of Energy is now in the process of completing the final report. This inventory is the first step in what is envisioned to be a multi-phase program to develop a state action plan. The second step will use this baseline inventory to assist in the development and analysis of policy options, with the final step being the formulation of a state action plan. *See* www.airquality.utah.gov/Planning/Emission- Inventory/Greenhousegas.htm. That action plan, and/or other initiatives, may or may not result in legislation or administrative rules to regulate GHG; however, unless and until such legislation or rules are adopted, the Executive Secretary is neither required nor authorized to regulate GHG.

2. Under the Definition of BACT, Utah is Not Required to Consider GHG When Determining BACT

Sierra Club contends that "pursuant to the definition of 'best available control technology" (BACT), Utah Admin. Code R307-101-2, Utah is required to consider other environmental impacts, such as green house gas emissions, when determining BACT for a facility." First, the referenced definition is just that – a definition. It is not a command or a requirement. The command aspect of the PSD program is set forth elsewhere in the regulatory scheme. *See* Utah Admin. Code R307-401-6(1) (requiring the applicant to demonstrate that "the degree of pollution control for emissions . . . is at least best available control technology . . . "); 42 U.S.C. § 7475(a)(4)("No major emitting facility . . . may be constructed . . . unless – the proposed facility is subject to the best available control technology for each pollutant subject to regulation."). Nothing in this definitional provision can be construed as an affirmative command or requirement.

Second, a cursory examination of the regulatory definition undermines Sierra Club's contention. Under the regulatory language, BACT means:

> [A]n emission limitation and/or other controls to include design, equipment, work practice, operation standard or combination thereof, based on the maximum degree or

> reduction of each pollutant subject to regulation under the Clean Air Act and/or the Utah Air conservation Act emitted from or which results from any emitting installation, which the Air Quality Board, on a case-by-case basis taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such installation through application of production processes and available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of each such pollutant...."

Utah Admin. Code. R307-101-2(4). Nothing in the language of this definition requires Utah to consider GHG in its BACT determination. Neither UDAQ, the Executive Secretary nor the Board has ever construed the BACT definition in this manner so as to require consideration of GHG. Moreover, neither the Utah Supreme Court nor any other Utah court has ever construed the BACT definition in this manner so as to require consideration of GHG.

3. "More Stringent" State Rules are Statutorily Prohibited

The Utah Code, Section 19-2-106, prohibits the Board from making any rule "for the purpose of administering a program under the federal Clean Air Act" that would be "more stringent than the corresponding federal regulations which address the same circumstances."[4] The creation of a new state rule that would be more stringent than the current federal regulations (which do not regulate GHG) would violate this statutory prohibition. The Board should abide by both the letter and the spirit of this prohibition against a new more stringent rule that would regulate GHG.

4. De Facto Rulemaking Should be Avoided: Sierra Club Should be Using Legislation and/or Administrative Rulemaking, rather than this Administrative Adjudication, to Pursue its Objective

The cart cannot be put before the horse – Sierra Club complains that the Executive Secretary failed to consider GHG in connection with the issuance of the AO, and then complains

[4] The only exception to this prohibition is if the Board "makes a written finding after public comment and hearing and based on evidence in the record, that corresponding federal regulations are not adequate to protect public health and the environment of the state. Utah Code Ann. §19-2-106(2). Of course, here, the Board has not come to any such conclusion, and certainly has not made any such written findings after public comment and hearing.

that Utah should be required to regulate GHG. Sierra Club is attempting to use the administrative adjudication process to achieve an objective that should be pursued through the legislative or administrative rulemaking process. If Sierra Club thinks GHG should be regulated, it should pursue a legislative remedy or initiate an administrative rulemaking. If, as all the parties except Sierra Club contend, the Utah Air Conservation Act does not currently obligate Utah to regulate GHG, Sierra Club should pursue state legislation as has been done in other states. On the other hand, if, as Sierra Club contends, the Utah Air Conservation Act already obligates Utah to regulate GHG, then Sierra Club should initiate a rulemaking procedure, pursuant to the Utah Administrative Rulemaking Act, Admin. Code Ann. §§63-46a-1 et seq., to develop appropriate implementing regulations.

Courts and commentators have long "shown near unanimity in extolling the virtues of the rule-making process over the process of making 'rules' through case-by-case adjudication." Shapiro, *The Choice of Rulemaking and Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921 (1965). *See also* Davis & Pierce Treatise § 6.8 ("when an agency ... announces a generally applicable rule in the process of adjudicating a particular dispute, only the parties to the dispute have a role in shaping the 'rule,' even though it ultimately affects thousands of regulatees and beneficiaries who had no opportunity to participate in the process of its formulation."); Davis & Pierce Treatise § 6.4 ("[m]any legislative rules 'interpret' statutory language, in the sense that they announce the agency's construction of a statute it has responsibility to administer.") Sierra Club's attempt to persuade the Board to take this dramatic step toward regulating GHG, through this Sevier Power-specific adjudication, could significantly affect the entire regulated community. Significant and broadly applicable public policy issues such as this, however, are best resolved openly by legislation or rulemaking, rather than through

a case-specific adjudication. The Board should avoid the sort of de facto rulemaking that Sierra Club is suggesting.

B. **Integrated Gasification Combined Cycle (Claim #2)**

In its Request for Agency Action, Sierra Club asserts that the Executive Secretary was "required" to consider IGCC in its BACT analysis, but failed to do so. Sierra Club asks the Board to reinterpret the definition of BACT set forth in the applicable state regulation so as to require a proposed power plant that has already selected another type of electrical production technology (in this case, a CFB Boiler coupled with an electrical generator) to include an altogether different technology (in this case, IGCC) in the BACT analysis.[5]

If the Board were to accept Sierra Club's new interpretation, the practical effect could be very far reaching. Sierra Club argues that, as a matter of law – IGCC must be considered for any proposed project that intends to use coal for fuel, not just the Sevier Power Facility. If Sierra Club's new interpretation of the existing regulation is accepted for the Sevier Power Facility, that same interpretation may be applied to every other coal plant which seeks an AO in Utah. *See Salt Lake Citizen's Congress v. Mountain States Tel. & Tel. Co.*, 846 P. 2nd 1245, 1252 (Utah 1992)("Administrative agencies, like courts, have authority to establish rules of law and they do so in two ways by promulgating rules and by issuing decisions as a necessary incidence of adjudication. Rules of law developed in the context of agency adjudication are as binding as those promulgated by agency rule making; thus, rules of law established by adjudication apply to the future conduct of all persons subject to the jurisdiction of an administrative agency."); Kenneth Cup Davis & Richard J. Pierce, Administrative Law Treatise ("Davis & Pierce

[5] PacifiCorp is not opposed to the use of IGCC as a generating technology. Indeed, PacifiCorp's most recent Integrated Resource Plan includes IGCC among its prospective generating resources. PacifiCorp is adamantly opposed, however, to IGCC being required as part of a BACT analysis for a proposed facility simply because it intends to use coal as a fuel source.

Treatise") § 11.5 (4th ed. 2002) (agencies must generally follow their own precedents or interpretations, or explain why they have departed from them); *Atchison, Topeka & Santa Fe R. v. Wichita Bd. Of Trade*, 412 U.S. 800, 808 (1973).

1. BACT is Not a Means to Redefine the Source

By claiming that the Executive Secretary should have included IGCC in its BACT analysis, Sierra Club is arguing that a BACT review can be used as a means to force an applicant to redefine the proposed source. This interpretation is contrary to the plain language of the BACT requirement, established federal policy, the reiteration by EPA of that federal policy, and established Utah state policy.

a. The BACT Definition: The BACT definition requires that "production processes and available methods, systems and techniques" that are potentially applicable to the proposed source be included in a BACT analysis. However, BACT does not require that altogether different "alternatives" to the proposed source, that would replace the proposed source with a different type of source, be included. Instead, the BACT analysis need only include the "available control technologies" for the particular emission source that the applicant has elected to propose.[6] In this case, the applicant has not proposed a geo-thermal source, a gas-fired source, or an IGCC source; rather, Sevier Power has elected to propose a CFB Boiler source. *In re Spokane Regional Waste-to-Energy Applicant, PSD App. No. 88-12,* 1989 WL 266360, n.7 (EPA June 9, 1989) ("EPA has not required a PSD applicant to change the fundamental scope of its project.").[7]

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[6] Under the well-established permitting process, the applicant proposes the particular source, and then, through the BACT process, an appropriate emission control is put into place. It is the prerogative of the applicant to propose the type of source, whether gas-fired, IGCC, or some other source, and then, through the BACT process, an appropriate emission control specifically tailored to the selected source is put into place.

[7] It is herein that Sierra Club misapplies the BACT process. BACT requires that "available control technologies" be considered, not every other conceivable type or source of combustion.

b. Established Federal Policy: Under the long-established practice of the EPA, the applicant proposes the particular type of source, and then through the BACT analysis the applicant identifies available control technologies for the particular type of source proposed.[8] *In the Matter of: Hawaiian Commercial & Sugar Co.*, 1992 WL 191948, 4 E.A.D. 95 (E.P.A. July 20, 1992); *In re: Hillman Power Co., L.L.C.*, 2002 WL 1822719 (E.P.A. July 31, 2002). As explained in EPA's NSR Manual, "[h]istorically, EPA has not considered the BACT requirement as a means to redefine the design of the source when considering available control alternatives. For example, applicants proposing to construct a coal-fired electric generator, have not been required by EPA as part of a BACT analysis to consider building a natural gas-fired electric turbine although the turbine may be inherently less polluting per unit product." NSR Manual, at B.13. Sierra Club should not be allowed to misuse the First Step of the BACT process as a tool to force an applicant to change "the emission source in question," to "redefine the source" or to "change the fundamental scope of its project." IGCC is a

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[8] In *In re Pennsauken County, New Jersey Resource Recovery Facility*, PSD Appeal No. 88-8, 1988 WL 249035 (EPA November 10, 1988), the EPA's Environmental Appeals Board ("EAB") clarified that "[t]he first step in this approach is to determine, *for the emission source in question*, the most stringent control available .... *[T]he conditions themselves are not intended to redefine the source*, as petitioner [] would have them do. In other words, *the source itself is not a condition of the permit.*" The petitioner's "fundamental objections to the ... permit [we]re not with the control technology, but rather, with the municipal waste combustor itself." The petitioner urged the rejection of the proposed waste combustor in favor of co-firing a mixture of refuse and coal at existing power plants. The EAB held that such objections to the source proposed, rather than to the control technologies identified, were "beyond the scope of this proceeding and therefore are not reviewable. Under 40 C.F.R. § 124.19, the review is restricted to the 'conditions' in the permit." The decision goes on to provide that "[t]he permit conditions that define these systems are imposed on the source as the applicant has defined it. Although imposition of the conditions may, among other things, have a profound effect on the viability of the proposed facility as conceived by the applicant, the conditions themselves are not intended to redefine the source, as petitioner [] would have them do. In other words, the source itself is not a condition of the permit." (emphasis added). *See also* In *Spokane Regional Waste-to-Energy*, PSD Appeal No. 88-12, 1989 WL 266360 (EPA June 9, 1989)(In framing the scope of the first step of the analysis (identifying "all available control technologies"), the EAB stated that "a technology is obviously not available in any meaningful sense if knowledge about its effect on emissions, *in the particular configuration in which it would be employed*, is so incomplete as to be unusable." (emphasis added)); *In re Brooklyn Navy Yard Resource Recovery Facility*, PSD App. No. 88-10, 1992 WL 80946 (EPA February 28, 1992)(EAB stated that its "decision to remand this permit for consideration of source separation for NOx control is *not intended to result in any reconfiguration of the Brooklyn facility or significant change in its planned usage.*")(emphasis added)).

fundamentally different type of source than the proposed CFB Boiler,[9] and Sierra Club's suggested reinterpretation of the BACT requirement would impermissibly require the applicant to redefine the proposed source.

c. EPA's Reiteration of Federal Policy: In a December 13, 2005 letter from Stephen D. Page, Director of EPA's Office of Air Quality, Planning and Standards, attached hereto as Exhibit A, EPA reiterated its long-established interpretation of the BACT definition and its policy of not requiring IGCC to be considered in such BACT analyses ("EPA's Reiteration Letter"). The Reiteration Letter, "based on prior EPA policy statements and adjudicatory decisions," reflects EPA's established view of how the applicable statutes and regulations should be interpreted and applied. Although the Reiteration Letter was not issued by EPA as a new regulation, and by itself does not create any new legally binding effect on the Board, the Executive Secretary or any other regulated entity or person, the Reiteration Letter does reflect longstanding federal policy.[10]

In the Reiteration Letter, EPA confirmed that "[a]s noted in prior EPA decisions and guidance, *EPA does not consider the BACT requirement as a means to redefine the basic design of the source or change the fundamental scope of the project when considering available control alternatives*. For example, we do not require applicants proposing to construct a coal-fired steam electric generator to consider building a natural gas-fired combustion turbine as part of a BACT analysis, even though the turbine may be inherently less polluting . . . ." (emphasis added). EPA

[9] Generating electrical power through using coal and IGCC technology involves "gasifying" coal and then combusting the gas to power a gas turbine, while the exhaust gases are heat exchanged with water/steam to generate additional electricity through a steam turbine. This process is very different from a CFB Boiler with its associated steam turbines currently proposed by Sevier Power.

[10] On September 25, 2006, the EPA entered into an agreement with several environmental organizations wherein EPA readily stipulated that the December 13, 2005 document was not promulgated as a regulation under the Clean Air Act, was not a final agency action, and by itself did not created any rights, duties, obligations, or any other legally binding effects on EPA, the states, tribes, any regulated entity or any person.

concludes by stating that "we would not include IGCC in the list of potentially applicable control options that is compiled in the first step of a top-down BACT analysis. Instead, we believe that an IGCC facility is an alternative . . . ." Sierra Club's suggested reinterpretation contradicts established EPA decisions and guidance as reflected in EPA's Reiteration Letter.

d. UDAQ Policy: The Executive Secretary and UDAQ have already twice taken the position that the BACT requirement does not oblige the applicant for a particular proposed source to consider using a completely different source as a means to reduce emissions.[11] More specifically, UDAQ has taken the position that the BACT requirement does not require the applicant for a coal-fueled electricity generating facility to consider using IGCC. Administrative agencies must generally follow their own precedents or interpretations, or explain why they have departed from them. Davis & Pierce Treatise, § 11.5; *Atchison,* 412 U.S. at 808; *JSG Trading Corp. v. Dep't of Agriculture*, 176 F.3d 536 (D.C. Cir. 1999) (reversing agency for construing new definition of statutory term without explanation); *Contractors Transport Corp. v. U.S.*, 537 F.2d 1160, 1162 (4th Cir. 1976) ("the grounds for an agency's disparate treatment of similarly situated applicants must be reasonably discernible from its report and order"). The Board should follow the established interpretation on this IGCC issue. In light of the established federal precedent, and the EPA Reiteration Letter reflecting the established federal precedent,

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[11] In this matter UDAQ previously determined that "BACT is used as a control technology *after* selection of the process to be so controlled. In BACT guidance issued by EPA it states that, '[h]istorically, EPA has not considered the BACT requirement as a means to redefine the design of the source...'" September 27, 2004 Memorandum to Sevier Power Plant File, at 30 (emphasis added). UDAQ went on to conclude that "[t]he process chosen by the source needs to be made based on the requirements of the source and the site selected for its installation. Control techniques are *then* applied to reduce the emissions of that process." *Id.* (emphasis added).

UDAQ has also determined in another matter that IGCC is not BACT because such would require "redefining the design of the source," and because IGCC is not a "control technology" under BACT. October 14, 2004 Memorandum to IPSC File, at 4. UDAQ went on to conclude that "[n]either federal nor state clean air laws require this." *Id.* at 5. " In refuting claims that IGCC should be included in the BACT analysis, UDAQ also relied on EPA's statements on the subject. "Historically, EPA has not considered the BACT requirement as a means to redefine the design of the source when considering available control alternatives." *Id.* at 4.

and the established state precedent, it would be very difficult for the Board to articulate an explanation justifying a departure from those precedents.[12]

2. "More Stringent" State Rules are Statutorily Prohibited

As addressed above in more detail, the Utah Code, Section 19-2-106, prohibits the Board from making any rule "for the purpose of administering a program under the federal Clean Air Act" that would be "more stringent than the corresponding federal regulations which address the same circumstances." The Board's creation of a new state rule that would be more stringent than the long-established federal policy would violate this statutory prohibition.

3. De Facto Rulemaking Should be Avoided: Sierra Club Should be Using Legislation and/or Administrative Rulemaking rather than this Administrative Adjudication

Sierra Club's attempt to reinterpret the applicable state regulation is tantamount to a rule-making in that the existing state regulation, which has never been interpreted to require consideration of IGCC as part of a BACT analysis, would be fundamentally changed. As addressed above in more detail, courts and commentators have long "shown near unanimity in extolling the virtues of the rule-making process over the process of making "rules" through case-by-case adjudication." Shapiro, *The Choice of Rulemaking and Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921 (1965). *See also* Davis & Pierce Treatise § 6.8. This significant and broadly applicable public policy issue should be resolved openly through

[12] Other states that have encountered this issue have expressly rejected Sierra Club's reinterpretation of the BACT requirement. For example, after an environmental group challenged the Wisconsin Department of Natural Resources' approval of a proposed coal fired unit for failure to have considered IGCC in its BACT analysis, an Administrative Judge confirmed that the State was not required to consider IGCC. *See* Wisconsin Division of Hearings and Appeals, Case No. IH-04-03 (February 3, 2005). *See also* West Virginia Department of Air Quality, Response to Comments 2, at 35 (West Virginia Department of Air Quality, in considering a PSD permit application for the Longview power plant, concluded that IGCC was not required to be included in the BACT analysis.). *See also* transcript of the Board's May 10, 2006 hearing in Richfield, Utah, at p.64 (regarding similar decisions by Arkansas, West Virginia, Kentucky, Indiana, Florida, Arizona, Wyoming, Colorado and others). Of the many states to have considered the issue, only Illinois and New Mexico have decided to exercise their regulatory discretion to consider IGCC in a BACT analysis.

legislation or rulemaking, rather than through a case-specific adjudication. The Board should decline to indulge in this sort of de facto rulemaking.

VI. CONCLUSION

Sierra Club's Claim #1 and Claim #2 involve no factual issues, but present only the legal issues of whether the Executive Secretary was required to address GHG, and to consider IGCC in the BACT analysis. Under the applicable statutes and regulations, the Executive Secretary was neither required nor authorized to address GHG. Similarly, under the applicable regulatory requirement, federal precedent (recently restated in EPA's Reiteration Letter), and state precedent, the Executive Secretary was not required to include IGCC in its BACT analysis. Accordingly, because Sierra Club has failed to meet its burden of showing that the Executive Secretary erred on these two legal issues, PacifiCorp respectfully requests that the Board grant its Motion for Judgment on the Pleadings as to Sierra Club's Claim #1 and Claim #2.

Dated this 26th day of February, 2007.

ATTORNEYS FOR PACIFICORP

STOEL RIVES LLP

Martin K. Banks

Michael G. Jenkins, by MB
Assistant General Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of February, 2007, I emailed and mailed a true and correct copy of the foregoing **PACIFICORP'S MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS** to the following:

Fred Nelson
Attorney General's Office
160 East 300 South, 5th Floor
Salt Lake City, Utah 84114
fnelson@utah.gov

Fred Finlinson
Finlinson & Finlinson
11955 Lehi-Fairfield Road
Lehi, Utah 84043
f2fwcrf@msn.com

Joro Walker
Dave Becker
1473 South 1100 East, Suite F
Salt Lake City, Utah 84105
jwalker@westernresources.org
dbecker@westernresources.org

Chris C. Stephens
Assistant Attorney General
Environment Division
Utah Attorney General's Office
150 North 1950 West
PO Box 144820
Salt Lake City, Utah 84114-4820
cstephens@utah.gov

Blaine Rawson
Holme Roberts & Owen
299 S. Main Street, Suite 1800
Salt Lake City, Utah 84111
blaine.rawson@hro.com

Paul M. McConkie
Assistant Attorney General
160 East 300 South
Salt Lake City, Utah 84114
pmcconkie@utah.gov

Brian Burnett
Callister Nebeker
Gateway Tower East, Suite 900
10 East South Temple
Salt Lake City, Utah 84133
brianburnett@cnmlaw.com

H. Michael Keller
Matthew F. McNulty, III
VanCott, Bagley, Cornwall & McCarthy
50 South Main Street, Suite 1600
Salt Lake City, Utah 84114
mkeller@vancott.com
mmcnulty@vancott.com

Michael Jenkins
Asst. General Counsel
PacifiCorp
201 South Main, #2200
Salt Lake City, Utah 84111
Michael.jenkins@pacificorp.com